

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

CCM PATHFINDER POMPANO BAY, LLC, :

Plaintiff,

INDEX NO. 08 CIV 5258
INDEX NO. 08 CIV 5297
INDEX NO. 08 CIV 5298

-against-

COMPASS FINANCIAL PARTNERS LLC
and COMPASS USA SPE LLC,

Defendant.

**DECLARATION OF BETTY M.
SHUMENER RE PLAINTIFFS'
RESPONSE TO SUPPLEMENTAL
REPLY OF COMPASS**

AND RELATED ACTIONS

X

I, Betty M. Shumener, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney licensed to practice law in the State of New York and before this Court. I am a partner with DLA Piper US LLP, counsel of record for plaintiffs CCM Pathfinder Pompano Bay, LLC and CCM Pathfinder Gramercy, LLC (“Pathfinder”). I have personal knowledge of the facts set forth herein and if called and sworn as a witness, I could and would testify competently thereto.

2. On August 7, 2008, Pathfinder filed the Objection Based on Lack of Personal Jurisdiction and Violation of Due Process to Plaintiff’s Emergency Motion (“Objection”) with the Nevada District Court. A true and correct copy of said Objection (without exhibits) is attached hereto as Exhibit “A.”

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 19th day of August 2008 in Los Angeles, California.



Betty M. Shumener

EXHIBIT "A"

Betty M. Shumener (California Bar No. 137220)
DLA PIPER US LLP
550 South Hope Street, Suite 2300
Los Angeles, CA 90071
Tel: 213.330.7700
Fax: 213.330.7701
Betty.shumener@dlapiper.com

Joanna Kishner (Nevada Bar No. 5037)
DLA PIPER US LLP
3960 Howard Hughes Parkway, Suite 400
Las Vegas, NV 89169
Tel: 702.677.3900
Fax: 702.737.1612
Joanna.kishner@dlapiper.com

Atorneys for Specially Appearing Third-Parties
CCM PATHFINDER BAY POMPANO, LLC and
CCM PATHFINDER GRAMERCY, LLC

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re:

**USA COMMERCIAL MORTGAGE
COMPANY,**

Debtor,

Case No. 2:07-CV-892-RCJ-GWF-BASE
and Case No. 3:07-CV-241-RCJ-GWF

OBJECTION BASED ON LACK OF PERSONAL JURISDICTION AND VIOLATION OF DUE PROCESS TO PLAINTIFF'S EMERGENCY MOTION FOR ORDER (1) GRANTING LEAVE TO FILE THIRD AMENDED CLASS ACTION COMPLAINT, (2) APPOINTING RECEIVER FOR CLASS MEMBER LOAN INTERESTS, (3) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT, (4) AUTHORIZING DISTRIBUTION OF NOTICE OF CLASS SETTLEMENT, AND (5) SETTING SCHEDULE FOR FINAL APPROVAL PROCESS; MEMORANDUM OF POINTS AND AUTHORITIES

**PRO HAC VICE APPLICATION
PENDING**

Date: August 11, 2008
Time: 11:00 a.m.

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26	28 U.S.C. § 23(b)(1)	7
27	28 U.S.C. § 23(b)(2)	6, 7
28	28 U.S.C. § 23(b)(3)	5, 6, 7

1 As specially appearing third parties who contest jurisdiction, CCM Pathfinder
 2 Bay Pompano, LLC (a lender who owns approximately 21% of the Bay Pompano
 3 Loan and 27% of the Palm Harbor Loan), and CCM Pathfinder Gramercy, LLC (a
 4 lender who owns approximately 20% of the Gramercy Court Loan), collectively
 5 “**Pathfinder Lenders**,” hereby object to Plaintiff’s Emergency Motion for Order
 6 (1) Granting Leave to File Third Amended Class Action Complaint, (2) Appointing
 7 Receiver for Class Member Loan Interests, (3) Preliminarily Approving Class
 8 Action Settlement, (4) Authorizing Distribution of Notice of Class Settlement, and
 9 (5) Setting Schedule for Final Approval Process (“**Emergency Motion**”).

10 By the Emergency Motion, Thomas Grimmet (“**Receiver**”) asks the Court to
 11 (i) put all the lenders (who are innocent third parties) into his receivership estate
 12 against their wills and over their objections so that he can bring a class action in
 13 their name, (ii) allow the Receiver to deprive those lenders of the right to opt out of
 14 such class, (iii) force those lenders to pay Compass \$34.5 million which may not be
 15 owed to Compass, and (iv) release all of those lenders’ claims against Compass for
 16 a payment of \$6 million to be shared among thousands of lenders, when the claims
 17 of the Pathfinder Lenders alone, which are being litigated in separate actions in
 18 New York, exceed \$10 million. The Receiver’s proposal is unfair and unlawful for
 19 the following reasons, among others.

20

21 1. **The Court Lacks Personal Jurisdiction Over The Pathfinder**

22 **Lenders To Put Them Into Receivership.** The United States District Court for
 23 the District of Nevada lacks personal jurisdiction over the Pathfinder Lenders. The
 24 Pathfinder Lenders are New York residents who have conducted no business in
 25 Nevada. The Pathfinder Lenders are innocent third parties who filed and are
 26 litigating separate actions against Compass for breach of contract and breach of
 27 fiduciary duty in New York (where they and Compass reside, where the documents
 28 and witnesses are located and in their choice of forum). The Pathfinder Lenders did

1 not participate in litigation in Nevada, filed no claim in the bankruptcy case of USA
 2 Commercial Mortgage Company ("USA") and were not members of the limited
 3 liability companies ("LLCs") who filed this adversary proceeding. As such, this
 4 Court lacks personal jurisdiction over them. The holding of the Ninth Circuit in
 5 *PACCAR Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1063
 6 and n.6 (1985), applies equally to the Pathfinder Lenders here:

7 We have refused, for example to uphold personal
 8 jurisdiction over a foreign corporation, which contracted
 9 with a California corporation, when the record revealed
 10 that the defendant 'has not performed any act relating to
 11 the contract at issue by which it purposefully availed itself
 12 of the privilege of conducting business in California.' If
 13 we accepted the analysis in *Wyle*, CBK could be forced to
 14 defend a suit in California even though it had never
 15 committed an affirmative act in California. Such a result
 would deprive CBK of due process.
 ...

13 While it is true that California law would apply, that fact is
 14 of little consequence. The fact that a contract is governed
 15 by the law of a particular state does not establish that the
 parties have purposefully availed themselves of the
 privilege of conducting business in that state.

16 (quoting *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa*
 17 *Rica*, 614 F. 2d 1247, 1254 (9th Cir. 1980).). The Pathfinder Lenders have not
 18 purposefully availed themselves of the privilege of conducting business in Nevada.
 19 Thus, the Court lacks jurisdiction to put them into receivership.

20
 21 2. **There is No Emergency.** Although the Receiver has deprived the
 22 lenders of an opportunity to conduct discovery to fully respond to his Emergency
 23 Motion, there is no emergency and the Receiver has made no showing of exigency.
 24 Yet on this shortened notice, the Receiver is proposing that the Court allow the
 25 Receiver to file a lawsuit in the name of lenders, deprive those lenders of the right
 26 to control their own property and ram a settlement down their throats which they
 27 believe is prejudicial and harmful to their interests, without giving the lenders the
 28

1 opportunity to opt out of the action. Not only is there no exigency for this
 2 "Emergency Motion," there is no equity to justify it.

3
 4 3. The Receiver Exceeded His Authority. The Amended Order
 5 Granting Motion to Appoint Receiver (**Exhibit "A"** hereto) provides, at paragraph
 6, as follows:

7 **Receiver cannot bind individual lenders in settlement**
 8 negotiations, but can voluntarily negotiate for their
 9 benefit, communicate settlement offers and make
 recommendations as he sees fit, to the lenders whether to
 accept or reject a proposal. (Emphasis added.)

10 The Receiver exceeded his authority by filing the Emergency Motion. In the
 11 Emergency Motion, the Receiver is attempting to compel lenders to participate in a
 12 class action against their will, deprive them of the right to opt out of the class, have
 13 their property placed in receivership and release their claims against Compass. The
 14 Receiver is not merely making recommendations. He is attempting to "bind
 15 individual lenders" to a settlement that many abhor as unreasonable and unfair.

16
 17 4. The Prerequisites For Putting The Lenders' Properties Into
 18 Receivership Cannot Be Met. Before a receiver may be appointed to take
 19 possession of property owned by the Pathfinder Lenders (or any of the lenders), the
 20 Receiver must show that he or the LLCs have an interest in the property. When the
 21 LLCs returned to the lenders their interests in the loans, the LLCs no longer had
 22 any interest in any of the property at issue in this action. In fact, the LLCs never
 23 had any interest in the property owned by third party lenders who were not
 24 members of the LLCs. The Receiver fares no better, as he stands in the shoes of
 25 the LLCs. Absent a showing that the LLCs and the Receiver have some interest in
 26 the property (which showing cannot be made), the prerequisites for appointing a
 27 receiver over the Pathfinder Lenders' property (as is true of other similarly situated
 28 innocent lenders) violates fundamental rights of due process and constitutes an

1 "abuse of discretion". *Mintzer v. Arthur L. Wright & Co.*, 263 F.2d 823, 825 (3d
 2 Cir. 1959); *Piambino v. Bailey*, 757 F.2d 1112, 1131 (11th Cir. 1985) ("This
 3 precedent holds that the receivership remedy they sought is available only to
 4 plaintiffs with an equitable interest in the property to be seized...."). The holding
 5 in *Mintzer* brings this issue into focus:

6 Courts exercise their discretion for the appointment of
 7 receivers when the existence of grounds and conditions
 prerequisite for such relief are shown. Because the
 8 remedy interferes with the defendant's property rights
 these grounds, in the absence of statute, require the
 9 existence of some legally recognized right held by the
 creditor in the debtor's property amounting to more than
 10 a mere claim against the debtor. Here the plaintiffs assert
 11 such right to be in the nature of a trust. If this assertion is
 12 not supportable, the appointment of the receiver was an
 13 abuse of discretion since it unquestionably interfered
 14 with defendant's right otherwise to completely control
 its own property; before being divested of that incident of
 15 ownership defendant in the circumstances before us would
 otherwise be entitled to adjudication of a full trial of the
 dispute between it and plaintiffs. And the Seventh
 Amendment assures that such adjudication may be by jury
 trial if the issue is one which was triable at law.
 16

Id. at 824-25 (emphasis added.).

17 Here, neither the Receiver nor the LLCs can lay claim to any interest in the
 18 loans or in the lenders' individual claims against Compass, and the lenders have
 19 done nothing to warrant forcing their property into receivership against their will.
 20 Yet that is precisely what the Receiver is proposing.
 21

22 5. **The Receiver and the LLCs Lack Standing.** Neither the LLCs nor
 23 the Receiver has standing to bring the Emergency Motion, as (a) no showing of
 24 exigency was made, (b) none of them has any interest in the loans, (c) none of them
 25 has any contractual relationship with Compass, and (d) principles of equity prohibit
 26 trampling on the rights of innocent lenders who do not wish to participate in the
 27 settlement proposed by the Receiver. *Phillips Petroleum Co. v. Shutts*, 472 U.S.
 28 797, 804 (1985) ("Generally stated, federal standing requires an allegation of a

1 present or immediate injury in fact, where the party requesting standing has ‘alleged
 2 such a personal stake in the outcome of the controversy as to assure that concrete
 3 adverseness which sharpens the presentation of issues.”). No such present or
 4 immediate injury in fact can be alleged by the LLCs or their Receiver. As the Ninth
 5 Circuit held in *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 506 n.4 (9th Cir. 1988):

6 At an “irreducible minimum”, Article III standing
 7 requires that a plaintiff show (1) “that he personally has
 8 suffered some actual or threatened injury” as a result of
 defendant’s conduct, (2) that the injury “fairly can be
 traced to the challenged action” and (3) that the injury “is
 9 likely to be redressed by a favorable decision.”

10 (quoting *Valley Forge Christian College v. Americans United for Separation of*
Church and State, 454 U.S. 464, 472 (1982).) See also *Warth v. Seldin*, 422 U.S.
 11 490 (1975). Neither the LLCs nor the Receiver “personally has suffered some
 12 actual or threatened injury.” *Id.* Accordingly, neither has standing to bring this
 13 Emergency Motion or to file the proposed Third Amended Complaint.

14
 15
 16 6. **An Opt Out Opportunity Is Required.** There is no conceivable
 17 reason to deprive the lenders of a meaningful voice in the process and of the right to
 18 opt out of the proposed class. If the lenders who have been victimized by USA and
 19 Compass wish to opt out of the class, they should be allowed to do so. After those
 20 lenders who have elected to opt out of the proposed class are excluded from the
 21 class, the Receiver and Compass can decide whether or not to proceed with their
 22 settlement and the terms on which to do so. To ram down the lenders’ throats a
 23 settlement which they believe is harmful to them is neither equitable nor lawful for
 24 the following reasons, among others:

25
 26 a. This action is predominantly for damages, not injunctive relief.
 27 As such, the proposed class action should be brought under 28 U.S.C. § 26(b)(3),
 28 not under 28 U.S.C. § 26(b)(1) or (2). *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168,

1 1186 (9th Cir. 2007) (“Rule 23(b)(2) is not appropriate for all classes and ‘does not
 2 extend to cases in which the appropriate relief relates exclusively or predominantly
 3 to money damages.’”). Here, the primary relief sought is the recovery of money,
 4 both for Compass as well as for the lenders. Even the so-called “waterfall” issue
 5 concerns the money that each party is to receive and the order in which the parties
 6 are to receive that money. As the relief sought is predominantly money, Rule
 7 23(b)(3) governs. *Id.*

8

9 b. Under Rule 23(b)(3), class members must be given the
 10 opportunity to opt out of the class. *Shutts*, 472 U.S. at 812 (“[W]e hold that due
 11 process requires at a minimum that an absent plaintiff be provided with an
 12 opportunity to remove himself from the class by executing and returning an ‘opt
 13 out’ or ‘request for exclusion’ form to the court.”); *Brown v. Ticor Title Co.*, 982
 14 F.2d 386 392 (9th Cir. 1992) (“In order to bind an absent plaintiff concerning a
 15 claim for monetary damages, the court must provide minimal due process....
 16 According to *Shutts*, minimal due process requires that ‘an absent plaintiff be
 17 provided with an opportunity to remove himself from the class.... Because Brown
 18 had no opportunity to opt out of the MDL 633 litigation, we hold there would be a
 19 violation of minimal due process if Brown’s damage claims were held barred by *res
 20 judicata*.’’); *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521, 522 (D.
 21 Nev. 1997) (“In a class action in which unnamed plaintiff class members are not
 22 permitted the opportunity to opt out, an unnamed plaintiff class member is not
 23 bound by that portion of a settlement which purports to preclude further claims for
 24 damages based on the same facts encompassed by the litigation.”).

25

26 c. Even if the Court were to allow the class action to proceed under
 27 Rule 23(b)(2), rather than Rule 23(b)(3), the Court can and should exercise its
 28 discretion to require notice to the lenders and an opportunity to opt out of the class.

Indeed, the law of the Ninth Circuit favors providing plaintiffs with the opportunity to opt out even when the action falls under Rule 23(b)(1) or (2). *Bauman v. Union Oil Co.*, 557 F.2d 650, 656 (9th Cir. 1977) (“[W]e do not believe that the order [allowing an opt-out provision for a class action under Rule 23(b)(2)] will have the damaging effect Bauman ascribes to it.”). The Court stated the matter poignantly in *DeGier v. McDonald's Corp.*, 76 F.R.D. 125, 127 (D.C. Cal. 1977):

Furthermore, equal protection and due process requires the right to opt out of Rule 23(b)(2) classes.

...

The Supreme Court has held that selective denials of access to trial court have violated the Equal Protection Clause. There can be no logical distinction between denial of access to a trial court and mandatory inclusion in a class action before a trial court. For whatever reason, a person has the right to bring or not bring his or her case to court. A selective inclusion of a person by way of a class action cannot be permitted unless that person has first the option to exclude himself or herself from the class. At least, if there is to be selective inclusion without the opportunity to exclude oneself, there must be a substantial justification. The court can find no such justification in the instant case.... Certainly a failure to give such an option to absent class members in this case would amount to a violation of the Equal Protection Clause and the Due Process Clause.

Id. at 127, citing *U. S. v. Kras*, 409 U.S. 434, 443-49 (1973) (emphasis added) (citations omitted).

No less is true here.

7. **The Opt Out Opportunity Is Critical Where, As Here, The Proposed Settlement Is Grossly Unfair.** The proposed settlement is grossly unjust and harmful to the very lenders it purports to protect.

a. **The Receiver Had No Opportunity To Conduct Due Diligence.** The Receiver did not undertake any of the due diligence necessary to determine whether the proposed settlement is fair or reasonable. The Receiver

1 could not do so because he did not have access to the underlying loan documents
 2 and loan servicing agreements. In an email dated August 4, 2008, the Receiver
 3 stated: "One of the things we are going to ask for is to expand the receivership to
 4 include the beneficial interests in the loans. This would give the receiver authority
 5 to demand all information on each loan...." (**Exhibit "B" hereto**) Before
 6 recommending a settlement that requires the lenders to pay Compass \$34.5 million
 7 and cap the lenders' contract and tort claims at \$6 million, the Receiver should
 8 undertake that due diligence. Given the hundreds of millions of dollars at stake for
 9 the lenders, before reaching terms with Compass, the Receiver should examine the
 10 underlying loan documents for each of the loans, the properties securing those loans
 11 and the loan servicing agreements. The Receiver is attempting to put the cart
 12 before the horse. Without due diligence, the Receiver cannot possibly tell whether
 13 the proposed settlement is fair or reasonable. By this Emergency Motion, not only
 14 has the Receiver failed to undertake the necessary due diligence, he is depriving the
 15 lenders of the opportunity to do so.

16
 17 **b. Compass Is Not Owed The Amounts Claimed.** The issues
 18 that are proposed to be "settled" concern the amount of late charges that Compass is
 19 entitled to receive, the amount of default interest that Compass is entitled to receive,
 20 and the conditions under which Compass is entitled to receive these amounts.

21 (i) Compass has assessed late charges on the entire amount
 22 owed under loans which have matured. However, some loan documents expressly
 23 prohibit Compass from assessing a late charge on the total amount owed on a loan
 24 when it matures, whereas other loan documents may allow Compass to do so.
 25 Nevertheless, Compass has assessed millions of dollars in late charges on the total
 26 amount owed on each loan at maturity, regardless of what the loan documents and
 27 loan servicing agreements state. Thus, for example, Section 8 of the promissory
 28 note governing the Bay Pompano Loan expressly prohibits Compass from imposing

1 a late charge on the total amount due at maturity, stating “Notwithstanding anything
 2 to the contrary contained in this Note, this five percent (5%) late charge ... will not
 3 apply to the total amount due under this Note if this Note is accelerated ... or not
 4 paid on the maturity date.” Nevertheless, Compass charged over \$964,676 in late
 5 charges on the total amount due at maturity under the Bay Pompano Loan, as
 6 compared to the \$9,651 in late charges that Compass was actually allowed to
 7 charge under the loan documents and loan servicing agreements.¹

8 (ii) Compass made similarly self-serving “errors” in its
 9 default interest calculation – compounding interest at the default rate when the loan
 10 documents allow only interest at the non-default rate to be compounded – resulting
 11 in millions of dollars in overcharges across many of the loans.

12 (iii) Similarly, many of the loan servicing agreements state
 13 that Compass may receive only late charges and default interest that Compass
 14 collects from the borrower. Nevertheless Compass has claimed millions of dollars
 15 in late charges and default interest that it never collected from any of the borrowers
 16 and, in some instances, never will collect from borrowers. As a result, those
 17 amounts are not owed to Compass at all.

18
 19 c. **The Lenders’ Claims Are Monetary Claims Worth Millions**
 20 **Of Dollars, Requiring The Right To Opt Out.** The lenders have tens of millions
 21 of dollars in claimed damages against Compass. Yet the proposed settlement
 22 would set aside a pool of only \$6 million to be shared among thousands of lenders,
 23 while requiring all lenders to release all claims against Compass. The Pathfinder
 24 Lenders’ claims against Compass alone exceed \$10 million. The Pathfinder
 25 Lenders already have straightforward complaints pending against Compass in New

26
 27 ¹ As this is an Emergency Motion, the Pathfinder Lenders attempted to avoid deluging the Court with voluminous
 28 documents and pleadings. However, they are prepared to provide copies of the loan documents regarding their loans
 as well as copies of their complaints against Compass upon request by the Court.

1 York seeking damages for breach of contract and breach of fiduciary duty, and if
 2 given the opportunity to do so (as is their right), would opt out of the settlement
 3 proposed by the Receiver. The Pathfinder Lenders are not willing to settle for a
 4 tiny fraction of a \$6 million pool to be shared with thousands of lenders so that each
 5 lender gets only a few pennies on the dollar. There is no reason to deprive the
 6 Pathfinder Lenders of their right to opt out of the class, their day in Court, their
 7 right to a jury trial or their right to possession and control of their own property.
 8

9 d. **The Receiver Disregards The Lenders' Concerns.** The
 10 Receiver is already showing disdain for the very lenders on whose behalf he is to be
 11 acting. When individual lenders expressed their concerns about the proposed
 12 settlement to the Receiver, the Receiver dismissed their concerns out of hand,
 13 claiming in an email dated August 4, 2008 that: "After sitting through a number of
 14 conference calls with direct lenders, I became convinced that many of the direct
 15 lenders would actually opt out of anything and everything without considering the
 16 unintended consequences of their actions." (**Exhibit "B" hereto**) Frankly, the
 17 lenders are entitled to "opt out of anything and everything," and it is insulting for
 18 the Receiver to believe that his views should silence the views of concerned lenders
 19 who have been grappling with this matter much longer than the Receiver. The
 20 Receiver has been involved in this matter for a few weeks, whereas the lenders
 21 whom he is dismissing out of hand have been dealing with this matter for years.
 22 The Receiver is not in a position to conclude that he knows better than these lenders
 23 what is in their best interests or whether they would "opt out of anything and
 24 everything without considering the unintended consequences of their actions."

25 In response to the concerns expressed by institutional investors whose
 26 opinions could not be dismissed in the same condescending manner, the Receiver
 27 resorts to name calling, calling them "vulture funds". Thus, in the August 4, 2008
 28 email, the Receiver states that, "all of these 'vulture funds' are opposed to the

1 settlement.” (**Exhibit “B” hereto**) First, these so-called “vulture funds” usually
 2 represent retirement trusts, pension funds and other worthy individuals,
 3 organizations and institutions. There is no reason to characterize or treat them as
 4 “vultures”. Second, if sophisticated investors are opposed to the settlement, there is
 5 probably sound economic reason for them to do so. Such investment managers are
 6 not running on emotion and name-calling. At least as to their own loans,
 7 institutional investors like the Pathfinder Lenders have performed extensive due
 8 diligence on the loans in which they have invested as well as on the properties
 9 securing those loans, as that is their job. Rather than presuming that such investors
 10 are exercising sound business judgment, however, the Receiver decided to label
 11 them “vulture funds”. Thus, when the Receiver is not dismissing individual lenders
 12 out of hand by characterizing them as contentious and unsophisticated, he is
 13 dismissing sophisticated lenders out of hand by characterizing them as “vulture
 14 funds”.

15

16 e. **The Costs Of The Proposed Settlement To The Lenders Is**
 17 **Enormous, Yet They Cannot Opt Out.** The Receiver acknowledges that, in
 18 addition to the \$34.5 million paid to Compass off the top, the lenders will be
 19 obligated to pay Receiver’s fees and legal fees over and above loan servicing fees
 20 to a new loan servicer. As the Receiver noted in his August 4, 2008 email, “Yes,
 21 we will charge our fees on top of the new servicer fees – we don’t work for free.”
 22 (**Exhibit “B” hereto**) While the Receiver goes on to state that his fees will be
 23 “mitigated” by the fact that the new loan servicer will charge approximately 1.2%
 24 less than Compass in loan servicing fees, he tacks on at the end that the proposed
 25 new loan servicer will also charge a “3% fee when the loan gets resolved.” Under
 26 the existing loan servicing agreements, Compass is not entitled to a “3% fee when
 27 the loan gets resolved.” Accordingly, under the Receiver’s proposed settlement,
 28 over and above the \$34.5 million that the lenders must pay to Compass off the top

1 and the additional fees they must pay to the Receiver and his attorneys, the lenders
 2 will now have to pay the new loan servicer a servicing fee that exceeds Compass'
 3 loan servicing fees by at least 1.8%, plus the legal fees and costs for that loan
 4 servicer's attorneys. Concurrently, the Receiver is proposing to release all the
 5 lenders' claims against Compass for only \$6 million. Frankly, if this is the
 6 proposed solution to the lenders' problems, the Court would be doing the lenders a
 7 great service by simply dismissing this adversary proceeding and allowing them to
 8 bring appropriate class actions or individual actions as they see fit.

9

10 Before forcing a settlement on thousands of lenders, many of whom want no
 11 part of it, the Court should order the Receiver to provide notice of the proposed
 12 settlement to all lenders and notify those lenders that they have the right to opt out
 13 of the class. When the Receiver has determined the number of lenders who have
 14 opted out of the class, Compass and the Receiver may then decide whether to
 15 proceed with seeking Court approval of the settlement as to those lenders who have
 16 not elected to opt out of the class. Under no circumstances should the lenders who
 17 have been victimized repeatedly be compelled to participate in a class action and
 18 class settlement which they regard as extremely harmful to their interests, while
 19 having their right to opt out of the class stripped from them.

20 Dated: August 6, 2008

DLA PIPER US LLP

21 By: 

22 BETTY M. SHUMENER

23 Attorneys for Specially Appearing Third-
 24 Parties CCM PATHFINDER POMPANO
 25 BAY, LLC and CCM PATHFINDER
 26 GRAMERCY, LLC

27 PRO HAC VICE APPLICATION PENDING

CERTIFICATE OF SERVICE

This certifies that, pursuant to Rule 5 of the FEDERAL RULES OF CIVIL PROCEDURE, on the 6th day of August, 2008, a true and correct copy of Objection Based on Lack of Personal Jurisdiction and Violation of Due Process to Plaintiff's Emergency Motion For Order (1) Granting Leave to File Third Amended Class Action Complaint, (2) Appointing Receiver For Class Member Loan Interests, (3) Preliminarily Approving Class Action Settlement, (4) Authorizing Distribution Of Notice Of Class Settlement, And (5) Setting Schedule For Final Approval Process; Memorandum Of Points And Authorities was served on all counsel of record via the Court's Electronic Case Filing system and to the following attorney of record by first class United States mail, postage prepaid:

13 Robert P. Cummins, Esq.
The Cummins Law Firm LLC
77 W. Wacker Dr., Suite 4800
14 Chicago, IL 60601

By:

Janet Curley
Janet Curley